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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

IN RE:

LIFE ENHANCEMENT PRODUCTS, INC.,  
Debtor.

Case No.: BK-N-14-51572-btb  
Chapter 11

**TRUSTEE'S MOTION TO SELL  
ESTATE ASSETS FREE AND CLEAR  
OF LIENS**

Hearing Date: March 7, 2017  
Hearing Time: 2:00 p.m.

Trustee James S. Proctor ("Trustee") hereby moves the Court (the "Sale Motion") for the entry of an order, pursuant to the provisions of Sections 105, 363 and 365 of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Local Bankruptcy Rules 2002 and 6004 as follows: (a) authorizing the Trustee to sell substantially all of the Debtor's assets free and clear of liens, interests and encumbrances (the "Sale") and (b) approving the Sale pursuant to (i) that certain Asset Purchase and Sale Agreement dated as of January 30, 2017 by and among James S. Proctor as the Ch. 11 Trustee of Debtor Life Enhancement Products, Inc. and Sierra Nevada Bioscience, LLC (the "Purchase Agreement," a copy of which is attached as **Exhibit 1**) or a higher and better offer received at the hearing set to consider approval of the sale.<sup>1</sup>

The motion is supported by the Declaration of James S. Proctor (Ct. Dkt. #289). The motion also is supported by the information on business operations and sale opportunities,

<sup>1</sup> As of the date of the filing of this motion, Sierra Nevada Bioscience, LLC, has reserved its name with the Nevada Secretary of State but not yet formally organized. The Buyer was represented during the negotiation of the Purchase Agreement by Maupin Cox & LeGoy, P.C.

1 presented by Mr. Proctor at the status hearing on January 18, 2017 (See Ct. Dkt. #293, Minute  
2 Order), attended by Creditor Samuel Kornhauser individually and by counsel. Some of that  
3 information is included as part of this motion.

#### 4 **I. INTRODUCTION**

5 1. On September 17, 2014 (the “Petition Date”), the Debtor filed its voluntary petition  
6 for relief under Chapter 11 of the Bankruptcy Code.

7 2. On April 16, 2015, this Court entered an Order that a chapter 11 Trustee be  
8 appointed by the U.S. Trustee with all the duties and powers set forth in 11 U.S.C. §§ 1106 and  
9 1108 (Ct. Dkt. #110).

10 3. On April 17, 2015, Tracy Hope Davis, as United States Trustee for Region 17,  
11 including the District of Nevada, filed an Appointment of Trustee and Application for Order  
12 Approving Appointment of Trustee with this Court, wherein the United States Trustee appointed  
13 James S. Proctor as the Trustee in the above-captioned case (Ct. Dkt. #113). This Court issued its  
14 Order Approving US Trustee’s Appointment of Chapter 11 Trustee on April 17, 2015 (Ct. Dkt.  
15 #115). The Trustee continues to operate the Debtor’s business and manage its financial affairs  
16 pursuant to Sections 1106(a) and 1108 of the Bankruptcy Code.

17 4. This Court has jurisdiction over this Sale Motion pursuant to 28 U.S.C. §§ 157 and  
18 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding  
19 pursuant to 28 U.S.C. § 157(b)(2). The statutory predicate for the relief requested herein is 11  
20 U.S.C. §§ 105, 363, and 365 of the Bankruptcy Code.

#### 21 **II. FACTUAL BACKGROUND**

22 5. Life Enhancement Products, Inc. (“LEP”) manufactures and provides nutritional  
23 supplements with unique formulations for general health, memory enhancement, blood sugar  
24 maintenance, cognitive enhancement, among others, based on formulations derived from known  
formulators across the country. The raw materials purchased for the products are derived from the  
highest-quality, pharmaceutical-grade ingredients and are packaged under clean-room conditions,  
and materials undergo lab testing to confirm purity. LEP offers its services through direct internet

1 sales to the public or through medical providers.

2 6. LEP leases commercial real property from Scientific Nutritional Formulations (an  
3 insider entity owned primarily by the LEP's majority equity holder, Wallace "Will" Block) at 2555  
4 Business Parkway in Minden, Nevada. The twenty-five (25) year lease provides for monthly rent  
5 of \$7,000. The estate is current on its post-petition rent obligations. As detailed below, the  
6 Trustee seeks to reject this lease with the closing of this proposed sale.

7 7. The Trustee has actively managed this business to resolve a number of outstanding  
8 issues at his appointment. There was only approximately \$24,000 in cash in the bank, including  
9 \$16,000 in customer deposits for backlogged orders. The Trustee, along with the hiring of Andrew  
10 Robinson as a business manager for debtor, has implemented numerous changes with payroll,  
11 inventory purchasing, product sales and production, formulator agreements and royalty payments,  
12 and financial reporting and projections. Many of these details were discussed at the hearing on  
13 January 18, 2017, and the Trustee is able provide additional detail as needed.

14 8. When the Trustee was appointed, Debtor was on the verge of a Chapter 7  
15 liquidation. Following the changes implemented after his appointment, the Trustee has considered  
16 three options (1) sell Debtor's assets to another entity seeking to sell nutritional supplements; (2)  
17 file a plan of reorganization, leaving pre-petition management in place and hoping for payments  
18 from Debtor's post-confirmation operations; or (3) converting the case and liquidating the  
19 assets. The Trustee determined a sale was the best option, notwithstanding inevitable constraints  
20 on the sales price given Debtor's financial performance and contractual arrangements.

21 9. The Trustee has marketed the business to those in the industry, those with had had  
22 prior involvement and/or interest in the company, individuals suggested by others, including two  
23 persons proposed by Mr. Kornhauser, a business broker (informally), and other professionals. (See  
24 Ct. Dkt. #289 at ¶8-11). A business broker was not formally engaged, given how much additional  
cost would be added to the transaction, relative to the proposed purchase price based on Debtor's  
financial operations. The Trustee has spoken with at least six potential purchasers. *Id.* at ¶10-  
11). Several potential purchasers have signed a confidentiality agreement in order to obtain

1 additional information about Debtor's assets.

2 10. After extensive negotiations, on January 30, 2017, the Trustee executed an Asset  
3 Purchase and Sale Agreement (the "Purchase Agreement") with Sierra Nevada Bioscience, LLC, a  
4 Nevada limited liability company ("Buyer") pursuant to which, among other things, Buyer has  
5 offered to purchase substantially all of the Debtor's assets, without warranty and in 'as-in' and  
6 'where-is' condition. The executed Purchase Agreement is attached hereto as **Exhibit 1**.

7 10. The Purchase Agreement provides that Buyer will purchase substantially all the  
8 assets owned and used in LEP's business. The transferred assets include personal property,  
9 inventory, records, intangible property and good will as identified in the Purchase Agreement,  
10 ¶ 2.2. The sale excludes (1) cash on hand or in the bank; (2) accounts receivable incurred through  
11 the date of the sale transactions; (3) expressly excluded contracts; and (4) an approximate \$6,000  
12 deposit held by shipping vendor Federal Express.

13 11. Buyer will not assume any liabilities except certain contracts assumed in connection  
14 with Buyer's acquisition of the assets. The Purchase Agreement further requires the Trustee to  
15 deliver assets free and clear of liens and encumbrances. The Purchase Agreement and proposed  
16 sale order specifically provide that Buyer will assume no other liabilities.

17 12. The proposed purchase price (the "Purchase Price") under the Purchase Agreement  
18 is \$500,000, to be paid in cash on or before the closing, designated as five (5) business days after  
19 Bankruptcy Court approval. All conditions precedent must be satisfied on or before March 31,  
20 2017, or the Purchase Agreement shall be null and void and without force or effect, with neither  
21 the Buyer nor Trustee having any rights, obligations or liabilities under the Purchase Agreement.  
22 Allocation of the Purchase Price by asset category for tax purposes is:

(a)	Personal Property	\$325,000
(b)	Inventory	\$150,000
(c)	Records	\$8,333
(d)	Intangible Property	\$8,333
(e)	Goodwill	\$8,334
	<b>TOTAL PURCHASE PRICE</b>	<b>\$500,000</b>

1           13.     The sale includes Debtor's customer lists, which include "personally identifiable  
2 information" under 11 U.S.C. § 101(41A). The sale does not trigger the appointment of  
3 consumer privacy ombudsman under 11 U.S.C. §§ 332(a) and 363(b)(1)(B) and Rule 6004(g), as  
4 Debtor's offering of products did not disclose to an individual customer a policy prohibiting the  
5 transfer of personally identifiable information about individuals to persons that are not affiliated  
6 with the Debtor. 11 U.S.C. § 363(b)(1).

7           14.     Buyer's offer under the Purchase Agreement is subject to overbids. Approval  
8 contemplates possible overbidding at the time of hearing set to approve the sale by the  
9 Bankruptcy Court, with any competing bids to be made in increments of \$10,000 to \$25,000.

10           15.     The proposed buyer has discussed agreements with management or key employees  
11 regarding future employment. The Trustee has no interest in such agreements, has not been party  
12 to those discussions, and has no knowledge of the material terms of any such agreements. L.R.  
13 6004(b)(6)(B).

14           16.     Any employee claims against Debtor for accrued paid time off will be addressed  
15 subsequently in this case under the provisions of the Bankruptcy Code.

### 16 **III. RELIEF REQUESTED**

17           17.     By this Motion, the Trustee requests entry of an order authorizing the sale to Buyer  
18 under the terms and conditions set forth in the Purchase Agreement, the proposed form of order  
19 attached as **Exhibit 2**. The proposed Sale Order reflects a sale of the Assets to Buyer pursuant to  
20 the Purchase Agreement. The actual Sale Order will be tailored to reflect the outcome of the  
21 Court's review and possible overbidding at the time of the hearing. In any event, the Sale Order  
22 should contain the basic provisions set forth in Exhibit 2 concerning approval of the sale to the  
23 successful buyer, if not the Buyer specified herein.

24           18.     The Trustee requests relief from the fourteen (14) day stay imposed by Fed. R.  
Bankr. P. 6004(h), in order to allow the sale to close without further delay and minimize any  
additional costs incurred by this Debtor.

1 **IV. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Sale of Substantially All of The Debtor's Assets Related to Its Business.**

3 Section 363 of the Bankruptcy Code provides authority for a trustee and, through the  
4 application of Bankruptcy Code section 1107(a), a debtor in possession, "after notice and a  
5 hearing, [to] use, sell or lease, other than in the ordinary course of business, property of the estate."  
6 11 U.S.C. § 363(b)(1). The authority to sell assets conferred upon a debtor by Section 363(b)  
7 "include[s] a sale of substantially all the assets of an estate." *Otto Preminger Films, Ltd. v. Qintex*  
8 *Entertainment, Inc. (In re Qintex Entertainment, Inc.)*, 950 F.2d 1492, 1495 (9th Cir. 1991).

9 A bankruptcy court's power to authorize a sale under Section 363(b) is to be exercised at  
10 the court's discretion. *In re WPRV-TV*, 983 F.2d 336, 340 (1st Cir. 1993); *New Haven Radio, Inc.*  
11 *v. Meister (In re Martin-Trigona)*, 760 F.2d 1334, 1346 (2d Cir. 1985); *Committee of Equity Sec.*  
12 *Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983); *Stephens Indus.,*  
13 *Inc. v McClung*, 789 F.2d 386, 390-91 (6th Cir. 1986).

14 Courts in the Ninth Circuit have authorized a sale of all or substantially all of a debtor's  
15 assets pursuant to § 363 of the Bankruptcy Code when there is a good business reason for so doing.  
16 *See, e.g., In re American Dev. Corp.*, 95 B.R. 735, 739 (Bankr. C.D. Cal. 1989) (among the factors  
17 that determines whether a good business reason exists is whether the sale is in the best interests of  
18 the estate's creditors); *see also, e.g., Lionel*, 722 F.2d at 1071; *In re Martin*, 91 F.3d 395 (3d Cir.  
19 1996); *In re Titusville Country Club*, 128 B.R. 396 (Bankr. W.D. Pa. 1991).

20 Courts have also required that the debtor provide reasonable and adequate notice of the  
21 sale, that the sale price be fair and reasonable, and that the sale be the result of good faith  
22 negotiations with the buyer. *See, e.g., In re Ewell*, 958 F.2d 276 (9th Cir. 1992) (declining to set  
23 aside or modify a sale pursuant to 11 U.S.C. § 363 because the price was fair and reasonable and  
24 the buyer was a good faith purchaser pursuant to Section 363(m) of the Bankruptcy Code); *In re*  
25 *King-Wilson*, Case No. C-98-1484 MMC, 1998 U.S. Dist. LEXIS 16595 at \*11-12 (N.D. Cal. Oct.  
26 13, 1998); *In re Canyon P'ship*, 55 B.R. 520 (Bankr. S.D. Cal. 1985); *see also, e.g., In re Abbotts*  
27 *Dairies*, 788 F.2d 143, 147-50 (3d Cir. 1986); *In re Tempo Tech. Corp.*, 202 B.R. 363, 367 (D.

1 Del. 1996), *aff'd sub nom. Diamond Abrasives Corp. v. Temtechco, Inc. (In re Temtechco, Inc.)*,  
2 141 F.3d 1155 (3d Cir. 1998).

3 In *Lionel*, the Second Circuit Court of Appeals held that the standard for the proper  
4 exercise of the debtor's discretion is a good business reason. *Id.* at 1071. (The Ninth Circuit has  
5 followed a similar evaluation. *In re Dant & Russell, Inc.*, 853 F.2d 700, 704-705 (9th Cir. 1988)).  
6 The Second Circuit in *Lionel* adopted, in part, the following criteria for evaluating whether a good  
7 business reason exists for authorizing a sale of substantially all of the assets of a debtor: (1) the  
8 proportionate value of the asset to the estate as a whole; (2) the amount of elapsed time since the  
9 filing of the petition; (3) the likelihood that a plan will be proposed and confirmed in the near  
10 future; (4) the effect of the proposed disposition on future plans of reorganization; and (5) most  
11 importantly, whether the assets to be sold are decreasing or increasing in value. *Id.* The Trustee  
12 respectfully submits that the proposed sale of substantially all of the Debtor's assets as set forth  
13 herein is entirely consistent with the guidelines set forth in *Lionel* and applicable law. The  
14 proposed sale should, therefore, be approved.

15 The Trustee believes that a prompt sale will maximize the amount the estate and its  
16 creditors may realize for the assets. The terms and conditions of the Purchase Agreement are fair  
17 and reasonable and in the best interest of the estate and its creditors. Moreover, the Purchase  
18 Agreement is the product of marketing and good faith, arms'-length negotiations between the  
19 Trustee and Buyer. The Trustee is confident that the successful purchaser that emerges from the  
20 process of offering overbids will be the highest and best bid obtainable for these assets.

### 21 **B. Sale Free and Clear**

22 The Trustee requests authorization to sell the Debtor's assets free and clear of liens,  
23 interests and encumbrances. Section 363(f) of the Bankruptcy Code authorizes a sale of property  
24 under § 363(b) "free and clear of any interest in such property of an entity other than the estate" if  
one of the following conditions is satisfied: (1) applicable nonbankruptcy law permits the sale of  
such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and  
the price at which such property is to be sold is greater than the aggregate value of all liens on such



1 property; (4) such interest is bona fide dispute; or (5) such entity could be compelled, in a legal or  
2 equitable proceeding, to accept a money satisfaction of such interest.

3 Section 363(f) further permits a sale of a debtor's assets free and clear of liens, interests  
4 and encumbrances, with such liens, interests and encumbrances attaching to the net proceeds of the  
5 sale. *See, e.g., In re Goffena*, 175 B.R. 386, 387 (Bankr. D. Mont. 1994); *In re Granite Lumber*  
6 *Co.*, 63 B.R. 466, 471 (Bankr. D. Mont. 1986) ("the real and personal property of the Debtor's  
7 estate was sold by the Trustee pursuant to Section 363(f) of the Code, free and clear of liens, with  
8 valid liens to attach to the proceeds of sale."); *see also, e.g., Folger Adam Sec., Inc. v. DeMatteis/*  
9 *MacGregor, J.V.*, 209 F.3d 252, 259 (3d Cir. 2000) ("[T]he holdings of the courts suggest that any  
10 interest in property that can be reduced to a money satisfaction constitutes a claim for purposes of  
11 § 363(f) and, therefore, attaches to the proceeds of the sale."); *In re Elliot*, 94 B.R. 343, 345 (E.D.  
Pa. 1988).

12 Sierra Nevada Bioscience, LLC and any other bidder will reasonably seek the comfort of a  
13 determination by the Court that the sale of the assets is free and clear of any liens, interests and  
14 encumbrances.

15 The Trustee is unaware of any additional security interests asserted against the Debtor's  
16 assets, other than the following creditors or claimants:

17 1. Bank of the West. Bank of the West ("BOW") holds a purported secured  
18 claim as evidenced by Proof of Claim 18-1, filed on December 31, 2014, and amended on January  
19 22, 2015, Claim 18-2, in the amount of \$86,658.42. The claim represents a loan evidenced by a  
20 Business Loan Agreement executed by the Debtor on June 16, 2014, in the principal amount of  
21 \$50,000, mutually amended to the increased amount of \$100,000. As collateral for the \$100,000  
22 business loan, Debtor gave a blanket security interest in all of its personal property assets. The  
23 UCC financing statement allegedly perfecting BOW's security interest was recorded in California,  
24 not Nevada, and the Trustee disputes the validity of BOW's status as a secured claim. The Trustee  
has been making the monthly interest-only payments on the loan as part of the ordinary course of  
the operation of Debtor's business, as approved by this Court (Ct. Dkt. #180, Stipulated Order,



1 filed Aug. 31, 2015). The Trustee asserts it may move forward with this sale based (1) the dispute  
 2 over the validity of the lien, under Section 363(f)(4); or (2) even if the bank does have a lien, the  
 3 price at which the property is to be sold (\$500,000) is greater than the value of the bank's lien  
 4 against the property (approximately \$86,000), under Section 363(f)(3).

5 2. ThermoFisher Scientific. The Debtor and ThermoFisher Scientific entered  
 6 into a Lease Agreement on or about January 16, 2012, for the lease of a Nicolet iS10 Mid Infrared  
 7 FT-IR Spectrometer system. The term of the lease is sixty (60) months, commencing January 31,  
 8 2012, and last payment is due February 20, 2017. At the time of the sale of the estate's assets, the  
 9 financial obligation imposed by the lease will be satisfied and, therefore, has no impact on the  
 10 proposed sale free and clear of liens. Further, with the buy-out option available at the payoff and  
 11 maturity of the lease to be exercised by the Trustee, the estate will own the system free of  
 12 ThermoFisher Scientific's interest and it will be conveyed to the Buyer.

13 3. Samuel Kornhauser Claim(s) Asserted in Pending Adversary Proceedings.  
 14 Samuel Kornhauser is the estate's largest creditor, having asserted an unsecured claim in the  
 15 amount of \$2,592,961.50 (*see*, Proof of Claim 20-1 filed January 9, 2015). The claim arises out of  
 16 litigation between the LEP, the Debtor's primary principal, Mr. Block, also a debtor in a Chapter 7  
 17 liquidation proceeding, and Mr. Kornhauser, resulting from Mr. Block/LEP's retention of Mr.  
 18 Kornhauser to perform legal services and was the subject of extensive litigation and the entry of a  
 19 judgment in favor of Mr. Kornhauser and against both LEP and Mr. Block. Mr. Kornhauser  
 20 commenced two adversary proceedings that name LEP: (1) *Kornhauser v Block (In re Block)*,  
 21 Adv. Proc. No. 16-05022 (Bankr. D. Nev.); and (2) *Kornhauser v. Block (In re Life Enhancement*  
 22 *Products, Inc.)* Adv. Proc. No. 16-05023 (Bankr. D. Nev.). Those adversaries are stayed pending  
 23 this sale, pursuant to the Court's orders entered in each adversary. Mr. Kornhauser does not claim  
 24 a lien on the property of the Debtor, but he does seek to pierce the corporate veil or otherwise  
 determine that Debtor is an alter ego of its primary principal, Mr. Block, based on his continued  
 efforts to pursue the objection to Mr. Block's exemption claim in Debtor's stock. If successful,  
 Mr. Block's rights in his shares of Debtor would lose their exemption, and the rights to those

1 shares would belong to the Chapter 7 trustee in his personal bankruptcy case.<sup>1</sup> Trustee does not  
 2 believe Section 363(f) applies to Mr. Kornhauser's claims. But out of an abundance of caution, the  
 3 sale can proceed based on (1) the bona fide dispute over the validity of any lien, under Section  
 4 363(f)(4); or (2) Mr. Kornhauser can be compelled in a legal or equitable proceeding to accept a  
 5 money satisfaction of such interest as the value of the assets otherwise flowing in to Mr. Block's  
 6 bankruptcy case, under Section 363(f)(5).

### 7 C. Sale in Good Faith

8 Section 363(m) of the Bankruptcy Code provides: The reversal or modification on appeal  
 9 of an authorization under subsection (b) and (c) of this section of a sale or lease of property does  
 10 not affect the validity of a sale or lease under such authorization to an entity that purchased or  
 11 leased such property in good faith, whether or not such entity knew of the pendency of the appeal,  
 12 unless such authorization and such sale or lease were stayed pending appeal. 11 U.S.C. § 363(m).  
 13 While the Bankruptcy Code does not define "good faith," the Ninth Circuit held that "Courts  
 14 generally have followed traditional equitable principles in holding that a good faith purchaser is  
 15 one who buys 'in good faith' and 'for value.'" *In re Ewell*, 958 F.2d 276, 281 (9th Cir. 1992).

16 The Trustee negotiated the Purchase Agreement in a fair manner and that due to the  
 17 open and competitive nature of the sale, the Purchase Agreement finalized with the  
 18 proposed Buyer (or with some other successful bidder) will, by definition, be the result of  
 19 arms'-length negotiations in good faith.

20 Furthermore, this transaction does not fall within the state law standards for cases of  
 21 successor liability. *Village Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 112 P.3d  
 22 1082 (Nev. 2005) (en banc). The Nevada Supreme Court elaborated on the most common  
 23 forms of successor liability, *de facto* merger and mere continuation. 112 P.3d at 1087.

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24 <sup>1</sup> It may have been suggested in the past that Debtor's assets would flow to Mr. Block's estate.  
 However, as noted in Debtor's statement of financial affairs, Debtor has two equity holders, Mr.  
 Block and Mr. Sutton (Ct. Dkt. #1, SOFA ¶21). Since this is not a single-member entity, Mr.  
 Block's estate may only gain the rights in the shares in Debtor, rather than Debtor's assets. *See*  
*In re B&M Land & Livestock, LLC*, 492 B.R. 262 (Bankr. D. Nev. 2013), *citing In re First*  
*Protection, Inc.*, 440 B.R. 821 (9th Cir. BAP 2010).

1 The “*de facto* merger” turns on four factors: continuity of the enterprise; continuity  
2 of shareholders; cessation of ordinary business operations; and assumption of obligations for  
3 ordinary business operations. *Id.* at 1087-90. Although there may be overlap in the  
4 business operations of Debtor and Buyer, the other factors do not support a determination of  
5 successor liability. There is no continuity of shareholders. Debtor’s statement of financial  
6 affairs reflects its ownership by Mr. Block (99.2%) and Allen Sutton (0.8%) (Ct. Dkt. #1,  
7 SOFA ¶21). Upon information and belief, the Trustee understands that Buyer’s primary  
8 member is Michael Nelson, who executed the Purchase Agreement, and that neither Messrs.  
Block nor Sutton has an interest in Buyer.<sup>1</sup>

9 The Nevada Supreme Court next looks at whether the seller corporation continued to  
10 exist after the sale of assets. Debtor will continue to exist as the Trustee collects accounts  
11 receivable, continues to evaluate any potential remaining claims, and puts together a  
12 proposal to bring this bankruptcy case to a close. Trustee lacks any knowledge whether  
13 Messrs. Block and Sutton will continue to utilize Debtor’s corporate form after conclusion  
14 of the bankruptcy. But even this limited continuation of the corporate case weighs against  
successor liability under *Village Builders*.

15 Finally, the Court considers the assumption of obligations. As noted before, there is  
16 no assumption of the Debtor’s lease. Additionally, Buyer is not assuming Debtor’s  
17 contracts with the formulators for the production of its products. As discussed in Mr.  
18 Proctor’s declaration and detailed in the oral status report on January 18, 2017, Debtor has  
19 one written, non-assignable agreement with a formulator, and the other agreements are oral  
20 (*See* Ct. Dkt. #289 at ¶20). As the Trustee has made clear, it is up to the Buyer to reach its  
21 own agreements with the formulators. There may be the assumption of some ordinary course  
22 obligations by Buyer, but they are not at the core of this proposed transaction.

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23 <sup>1</sup> As noted, Sierra Nevada Bioscience, LLC, has reserved its name with the Nevada Secretary of  
24 State but not yet formally organized. The Trustee believes he will be able to present any  
necessary evidence at the hearing about the difference in ownership between Debtor and Buyer.

1 The “mere continuation” turns on two factors: Only one corporation remains after  
 2 the sale, and identity of equity holders. 112 P.3d at 1090-92. As discussed above, Debtor  
 3 still will remain in existence after the sale, and there are difference in identity of equity  
 4 holders in Debtor and Buyer.

5 **D. Rejection of Real Property Lease and Assignment of Assumed Contracts**

6 The Debtor and Scientific Nutritional Formulations (“SNF”) are parties to a twenty-five  
 7 (25) year lease of non-residential real property located at 2555 Business Parkway, Minden,  
 8 Nevada. The lease term is June 1, 2012 to May 31, 2037, with monthly rent set over the term of  
 9 the lease at \$7,000 per month. The then-Debtor in Possession did not move to assume the lease (or  
 10 move to extend the time to assume or reject the lease) within 120 days after the commencement of  
 the Chapter 11 case. Therefore, the lease was deemed rejected. 11 U.S.C. § 365(d)(4)(A).

11 The Trustee has continued to occupy the real property and pay SNF the monthly \$7,000  
 12 lease obligation. *See* 11 U.S.C. § 365(d)(3). The Trustee now seeks to formally reject the lease.  
 13 The Trustee is unable to assume and assign the lease, and it is anticipated that Buyer will negotiate  
 14 its own lease with SNF. Regardless, the Trustee and Debtor’s bankruptcy estate have no use for  
 the building after the close of the sale.

15 The formal rejection of a lease under § 365 is accomplished by a noticed motion before the  
 16 Court, subject to this Court approval. *Alegre v. Michael H. Clement Corp. (In re Michael H.*  
 17 *Clement Corp.)*, 446 B.R. 394, 397 n.2 (N.D. Cal. 2011), *citing Pacific Shores Dev. LLC v. At*  
 18 *Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1065 (9th Cir. 2004). The Trustee seeks a  
 19 formal rejection of the lease in order to limit any administrative expenses, *In re Upper Crust, LLC*,  
 20 502 B.R. 1 (Bankr. D. Mass. 2013), or rejection claims of SNF against the estate, 11 U.S.C.  
 21 § 365(h)(1)(A). Given that the buyer is likely to negotiate its own lease with SNF, there may not  
 22 be any administrative expenses or rejection claims. Regardless, the Trustee seeks this formal  
 23 ruling in order to limit the estate’s liability by cutting off those claims at the close of the asset sale.  
 24

1 **VI. NOTICE**

2 In accordance with Fed. R. Bankr. P. 2002, the Trustee has given notice of this Sale Motion  
 3 and the Sale Hearing as follows: (a) serve a copy of this Sale Motion (with exhibits) upon (i) all  
 4 persons or entities required to be served pursuant to Orders of this Court; (ii) all parties who to the  
 5 knowledge of the Trustee presently hold or claim a lien upon or security interest in the Assets; (iii)  
 6 the individuals and entities believed by the Trustee to be potential purchasers; and (iv) the United  
 7 States Trustee; (b) serve a copy of a general notice of the relief requested by this Sale Motion (the  
 8 “Sale Notice”) by first class mail, upon all creditors and the equity security holders of Debtor.

9 The Trustee submits that such notice constitutes good and sufficient notice of the Motion,  
 10 and all proceedings to be held thereon and that no other or further notice need be given.

11 **VII. CONCLUSION**

12 Based on the foregoing, the Trustee respectfully submits that the relief requested herein is  
 13 necessary and appropriate, is in the best interests of the Debtor and its estate, and should be  
 14 granted in all respects. The Trustee respectfully requests that the Court enter the proposed orders  
 15 granting the relief requested herein and such other and further relief as is just and proper.

16 DATED: February 7, 2017.

KAEMPFER CROWELL

17 By: /s/ Louis M. Bubala III  
 18 LOUIS M. BUBALA III, ESQ.  
 19 Counsel to Chapter 11 Trustee  
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